IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.06.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).Nos.721 and 722 of 2007

Commissioner of Income Tax
Chennai. .. Appellant in both the appeals

Vs.

M/s. Asma Exports,
25, Moore Street,
Chennai - 1. .. Respondent in both the appeals

Appeals under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 11.2.2005 in ITA Nos.346 and 347/Mds/1999 for the assessment years 1995-96 and 1996-97 respectively, against the order of the Commissioner of Income tax (Appeals) IX Chennai dated 24.11.98 in ITA Nos.39 & 568/97-98 for the assessment year 1995-96 and 1996-97 against the order of Income tax officer, Assessment III Ward-I Madras dated 30/10/96 GI.No./PA.No.8386-A,8351-A for Assessment year 95-96, 96-97.

For Appellant : Mrs. Pushya Sitaraman
Sr. Standing Counsel

J U D G M E N T

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(Delivered by P.D.DINAKARAN, J.)

The above tax case appeals are directed against the common order of the Income-tax Appellate Tribunal dated 11.2.2005 made in ITA Nos.346 and 347/Mds/1999 for the assessment years 1995-96 and 1996-97 respectively.

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2. The Revenue is the appellant. The relevant assessment years are 1995-96 and 1996-97. The assessee is an exporter of readymade garments. The assessee claimed deduction under Section 80HHC for both the assessment years 1995-96 and 1996-97. The Assessing Officer while making the prima facie adjustment under Section 143(1)(a) of the Act, set off the business loss arrived under Section 80HHC(3) and accordingly by assessment orders dated 30.10.1996 restricted the deductions to Rs.11,29,091/- and Rs.5,03,209/- for the assessment years 1995-96 and 1996-97 respectively. Against the said assessment orders dated 30.10.1996, the assessee preferred appeals before the Commissioner of Income-Tax (Appeals), who by common order dated 24.11.1998, allowed the appeals accepting the contention of the assessee that the Assessing Officer while exercising the power under Section 143(1)(a) ought not to have set off the business loss arrived under Section 80HHC(3) and restricted the deduction to Rs.11,29,091/- and Rs.5,03,209/- for the assessment years 1995-96 and 1996-97 respectively even without giving an opportunity to the assessee and calling for the evidence and objections from the assessee as contemplated under Section 143(2)(i) and (ii) and that the Assessing Officer ought not to have deducted the notional loss from the export profit and accordingly the Commissioner held that the prima facie adjustment is not warranted for both the assessment years and directed the Assessing Officer to allow the deduction under Section 80HHC as claimed by the assessee. Against the said order dated 24.11.1998, the Revenue preferred further appeals before the Income-tax Appellate Tribunal. The Appellate Tribunal by common order dated 11.2.2005 confirmed the view of the Commissioner of Income-tax (Appeals) and dismissed the appeals.

3. Aggrieved by the same, the Revenue has preferred the above appeals raising the following substantial questions of law:

> "1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that calculation of deduction u/s 80HHC cannot be done by way of prima facie adjustment u/s 143(1)(a)?
>
> 2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the loss sustained by the assessee from its export business should be ignored and he should get the benefit of Section 80HHC?

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4. In this connection, it is apt to refer Section 143(2)(i) and (ii) of the Act, which provides for notice on the assessee calling for his evidence or objections.

> Section 143(2): Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,
>
> (i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the

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return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June,2003.

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that notice under [clause(ii)] shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

5. It is settled law that even though losses should be deducted from the profit available for the purpose of computation of relief under Section 80HHC, since the question of relief under Section 80HHC is a debatable issue, which does not fall within the purview of prima facie adjustment under Section 143(1)(a) and the same could be taken up only in regular assessment under Section 143(3) of the Act, the action of the Revenue invoking Section 154 of the Act to rectify the intimation under Section 143(1)(a) of the Act was not valid, vide Commissioner of Income-tax v. Nameel Leathers and Uppers 273 ITR 350.

6. In the instant case, the Assessing Officer while making prima facie adjustment as to the deduction under Section 80HHC for the above mentioned assessment years, had not even provided an opportunity to the assessee nor called on the assessee for his evidence or objections as contemplated under Section 143(2)(i) and (ii) of the Act, as referred to above, which is mandatory. The non compliance of such procedure contemplated under Section 143(2)(i) and (ii) of the Act, is a gross violation to the very spirit and scope of the prima facie adjustment provided under Section 143(1)(a) of the Act. Consequently, the refusal of deduction under Section 80HHC(3) for both the relevant assessment years is also illegal., because again it is trite law that the question of relief under Section 80HHC of the Act is a debatable issue and the same does not fall within the purview of prima facie adjustment under Section 143(1)(a) and that could be taken up only in regular assessment under Section 143(3) of the Act and Section 154 of the Act has no application.

7. In view of the above settled proposition, first question of law is answered in favour of the assessee. Since we have already upheld that the deduction under Section 80HHC is a debatable issue and the same cannot be decided in a prima facie adjustment under Section 143(1)(a) of the Act,

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but could be done only on regular assessment under Section 143(3), the second question of law does not arise for consideration.

Finding, therefore, no substantial question of law that arises for our consideration, these appeals are dismissed. No costs. M.P.No.1 of 2007 is also dismissed.

ATR

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras "A" Bench,
Rajaji Bhavan, Besant Nagar,Chennai. (5 copies)

2.The Commissioner of Income
Tax (Appeals) IX,
121,Mahatma Gandhi Salai,
Chennai.

3.The Assistant Commissioner of Income-tax
City Circle I, Chennai-34.

4. The Deputy Commissioner of Income Tax (Range-II)
Chennai.

5. The Income Tax Officer,
City Circle I (3)
Chennai.

+1 cc to M/s.Pushya Sitaraman, Advocate Sr.No.36717.

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